

M E M O R A N D U M

SUPREME COURT : QUEENS COUNTY  
IA PART 18

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IN THE MATTER OF THE APPLICATION OF  
KEVIN SCANLON, AS PRESIDENT OF NEW  
YORK STATE COURT CLERKS ASSOCIATION  
AND JOHN VISSICCHIO,

INDEX NO. 5508/03

BY: HART, J.

DATED:

For Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules,

-against-

JONATHAN LIPPMAN, AS CHIEF  
ADMINISTRATIVE JUDGE OF THE STATE OF  
NEW YORK-UNIFIED COURT SYSTEM, AND  
THE OFFICE OF COURT ADMINISTRATION,  
STATE OF NEW YORK UNIFIED COURT SYSTEM,

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This is an Article 78 proceeding brought by Kevin Scanlon, as President of the New York State Court Clerks Association, and John Vissicchio, a Senior Court Clerk, which seeks to annul a determination of the Chief of Employee Relations denying their out-of-title work grievance. The petitioners request, inter alia, a judgment directing the respondents to compensate petitioner Vissicchio for allegedly out-of-title work that he performed from January 1, 2002 through October 28, 2002.

Petitioner Vissicchio, a member of the petitioner association, is a Senior Court Clerk assigned to the Central Clerk's Office of New York City Criminal Court, Queens County (hereinafter "Queens Criminal CCO"). Respondent Jonathan Lippman is the Chief Administrative Judge of the State of New York Unified

Court System (hereinafter "UCS"), and respondent Office of Court Administration is the administrative arm of UCS. Petitioner Vissicchio, hired on March 3, 1977 by UCS as a court officer in the Civil Court of the City of New York, County of Queens, worked in that position for approximately ten years before he became a Senior Court Clerk assigned to the Criminal Court in Brooklyn. In 1990, UCS reassigned Vissicchio to Queens Criminal Court, and, in the fall of 2000, Vissicchio began to work in Queens Criminal CCO where he is presently.

Queens Criminal CCO, a general information center for the Criminal Court and the custodian of certain court records, has allegedly always been supervised by an Associate Court Clerk, slotted at a JG-23 position, who oversees the work of several Senior Court Clerks, among others. The UCS Title Standard for an Associate Court Clerk provides in relevant part that they "work as supervisors of a staff of part clerks and other personnel \*\*\* [and] supervise the Senior Court Clerks assigned to several other parts." A Senior Court Clerk, slotted at the JG-21 position, among other things, works at a public counter in an office, responds to inquiries, and serves as a part clerk when necessary. Senior Court Clerks allegedly do not supervise other Senior Court Clerks.

Around July, 2000, Frank Engel, an Associate Court Clerk who had been supervising Queens Criminal CCO, received a promotion and left the office. From July, 2000 through February, 2001, for

about seven months, UCS did not replace Engel with another Associate Court Clerk, but allegedly required petitioner Vissicchio to perform the duties of an Associate Court Clerk without additional compensation. In February 2001, UCS assigned Tommy Gregg, who was an Associate Court Clerk, to supervise Queens Criminal CCO, and he did so until his retirement in December, 2001. UCS again allegedly required Vissicchio to supervise Queens Criminal CCO, this time for ten months, from January 1, 2002 through October, 2002, without allegedly giving him the appropriate title and salary. Vissicchio's responsibilities allegedly included reassigning Queens Criminal CCO employees to other offices or courtrooms, giving approval for employee absences, answering questions raised by other Senior Court Clerks, and attending meetings of Associate Court Clerks. Petitioner Vissicchio's name was listed on an internal office directory as the person in charge of the Queens Criminal CCO, where the name of an Associate Court Clerk traditionally appears.

On June 12, 2002, the petitioner Association, which had entered into a collective bargaining agreement with UCS for 1999-2003, filed a grievance with the Deputy Chief Administrative Judge for the New York City Courts pursuant to Article 15, Section 1(a) and (b)(4) of the agreement, inter alia, contesting "a claimed assignment of employees to duties substantially different from those stated in their job specifications." On November 7,

2002, the Chief of Employee Relations denied the grievance on the ground that Vissicchio had not complied with the collective bargaining agreement which required the Association or the employee to file a grievance "not later than 45 calendar days after the date on which the act or omission giving rise to the grievance occurred or when the employee could reasonably have been expected to become aware of, or to have knowledge, that he/she had a grievance \*\*\*." The Chief of Employee Relations further found: "Even if the grievance had been timely filed, it would still be denied on the merits. The alleged out-of-title duties that Grievant performs all fall within, or are reasonably related to, and not substantially different than, the duties in the Senior Court Clerk (JG-21) title standard. \*\*\* Additionally, Grievant does not perform duties in the Associate Court Clerk (JG-23) title standard."

Petitioner Vissicchio currently earns an annual salary of \$67,582 as a Senior Court Clerk, and he contends that if he had been properly compensated during the ten month period for performing the duties of an Associate Court Clerk, he should have been paid at an annual rate of at least \$70,124, computed by adding his current salary to a JG-23 increment of \$2,542. Although the entry level salary for an Associate Court Clerk is only \$51,858, UCS allegedly places a promoted employee on the proper step in the higher title and pay level. Petitioner Vissicchio brought this Article 78 proceeding for the purpose of, inter alia, compelling

the respondents to pay him an additional \$2,118 plus interest. The petitioners state in their memorandum of law that they "recognize that this proceeding does not involve a significant amount of damages. However, Petitioners believe pursuing the same is necessary to remedy the extremely inequitable conduct of the UCS and to prevent the UCS from violating the prohibition against the assignment of Vissicchio and other court clerks to out-of-title work in the future."

The respondents admit that Central Clerk Offices have been supervised by Associate Court Clerks or clerks of even higher title. The respondents allege that during the relevant period assignments of Queens Criminal CCO staff were made by Borough Chief Clerk William Kalish and Deputy Borough Chief Clerk Kevin Begley, who also approved leave requests made by personnel, although the respondents admit that petitioner Vissicchio might have been informed of employee absences in the Queens Criminal CCO. William M. Kalish, now the Borough Chief Clerk of the New York City Criminal Court, Bronx County, who was the Borough Chief Clerk in Queens from March, 1999 to May, 2002, swears that from on or about December 29, 2001 until October 28, 2002, the date UCS assigned an Associate Court Clerk to Queens Criminal CCO, he and Kevin Begley, then the Assistant Borough Chief, directly supervised the Queens Criminal CCO and that petitioner Vissicchio did not perform the duties of an Associate Court Clerk. Kevin Begley swears that

"[d]uring the time that there was no Associate Court Clerk in charge of the CCO, William Kalish and I supervised that office. On a daily basis, petitioner would come into the Borough Chief Clerk's Office, and I or Mr. Kalish would give petitioner direction as to the assignments of staff, the approval of leave, and other such matters."

The petitioner has submitted reply affidavits from himself and from several co-workers which contradict the affidavits of William Kalish and Kevin Begley. Gregory Schmidt, a Senior Court Clerk assigned to the Queens Criminal CCO swears, inter alia, "Vissicchio supervised myself and the other Senior Court Clerks, planned and coordinated our work schedules within the CCO, assigned work both within and without the CCO, acted as troubleshooter when problems arose at the information counter and elsewhere in the CCO and was the point person for time and leave matters within the CCO. \*\*\* The bottom line is that Vissicchio was in charge of running the CCO during the period in issue." Anthony Vallone, another Senior Court Clerk who worked in Queens Criminal CCO, swears in another affidavit to the same effect: "In all respects Vissicchio ran the CCO from January through October 2002, in the same manner as his Associate Court Clerk predecessors and successor. He performed all the same functions they did, with the only exception being that he did not write up our performance evaluations."

Civil Service Law § 61, "Appointment and promotion,"

provides in relevant part: "\*\*\* 2. Prohibition against out-of-title work. No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder \*\*\*." (See, Civil Service Employees Ass'n Inc., Local 1000, AFSCME v Angello, 277 AD2d 576.) Section 25.20(b) of the Rules of the Chief Judge (22 NYCRR 25.20[b]) contains similar language. The prohibition against out-of-title work stated by statute and rule also finds expression in the collective bargaining agreement entered into by the petitioner association and UCS. Article 15.1(b) provides in relevant part: "A non-contract grievance is a dispute concerning: \*\*\* (4) A claimed assignment of employees to duties substantially different from those stated in their job specifications."

"An out-of-title work assignment exists when an employee has been assigned or compelled to perform the duties of a higher grade, without a concomitant increase in pay, frequently, recurrently and for long periods of time, unrelated to any temporary emergency requirement (see, O'Reilly v Grumet, 308 NY 351, 355). Moreover, out-of-title work under the Civil

Service Law has been established based upon a significant increase in supervisory responsibility (see, Matter of Rausch v Pellegrini, 237 AD2d 771; Matter of Kuppinger v Governor's Off. of Empl. Relations, 203 AD2d 664, 665) \*\*\*." (Caruso v Mayor of Village of South Glens Falls, 278 AD2d 608, 609.)

Administrative determinations regarding position classifications and related matters may be given "only limited judicial review, and will not be disturbed in the absence of a showing that they are wholly arbitrary or without any rational basis \*\*\* ." (Cove v Sise, 71 NY2d 910, 912, see, Matter of Steen v Governor's Office of Employee Relations, 271 AD2d 738; Civil Service Employees Ass'n Inc., Local 1000, AFSCME, AFL-CIO v State University of New York, 286 AD2d 850.) "When reviewing appeals involving out-of-title work grievances, courts generally hold that if the record as a whole provides a rational basis for the determination, it will be upheld \*\*\*." (Gergis v Governor's Office of Employee Relations, 206 AD2d 766, 768; see, Bailey v Governor's Office of Employee Relations, 259 AD2d 940; Tirone v Governor's Office of Employee Relations, 195 AD2d 816; Security and Law Enforcement Employees, Dist. Council 82, AFSCME, AFL-CIO, on Behalf of Krom v Hartnett, 119 AD2d 877.) The "standard of review in these matters is whether the record as a whole provides a rational basis for the determination to deny the grievance \*\*\* and [a court] will not disturb such determination unless it is 'wholly arbitrary

and without any rational basis' \*\*\*." (Civil Service Employees Ass'n Inc., Local 1000, AFSCME v Angello, *supra*, 578, quoting Scala v Gambino, 204 AD2d 933, 934; *see*, Woodward v Governor's Office of Employee Relations, 279 AD2d 725.) The petitioner has the burden of demonstrating that the administrative determination is either arbitrary, capricious or affected by an error of law. (*See*, Grossman v Rankin, 43 NY2d 493; Civil Service Employees Ass'n Inc., Local 1000, AFSCME, AFL-CIO v State University of New York, *supra*; Civil Service Employees Ass'n Inc., Local 1000, AFSCME, AFL-CIO v State University of New York, 280 AD2d 832.)

The first issue presented is whether there was a rational basis for the determination of the Chief of Employee Relations to dismiss the grievance filed by Vissicchio as untimely. The collective bargaining agreement provides in relevant part: "15.2 \*\*\* (a) Step 1. The employee or the union shall present the grievance in writing \*\*\* not later than 45 calendar days after the date on which the act or omission giving rise to the grievance occurred or when the employee could reasonably have been expected to become aware of, or to have knowledge, that he/she had a grievance." Since Vissicchio claimed that his out-of-title work began January 1, 2002 and since he did not file his grievance until June 12, 2002, the Chief of Employee Relations found that the grievance was untimely filed. This finding overlooked the "continuing violation doctrine" and is affected by an error of law.

The doctrine of a continuing wrong is applicable to both actions for breach of contract and Article 78 proceedings, and the respondents' contention, unsupported by citation, that the doctrine has no application to the parties' collective bargaining agreement has no merit. "[W]here a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously \*\*\*." (Airco Alloys Division, Airco Inc. v Niagara Mohawk Power Corp., 76 AD2d 68, 80; see, Stalis v Sugar Creek Stores, Inc., 295 AD2d 939.) In the case at bar, the respondents' obligation regarding out-of-title work was a continuing one, and the petitioners' claims regarding a breach of that obligation are "not referable exclusively to the day the original wrong was committed \*\*\*." (Stalis v Sugar Creek Stores, Inc., supra, 941, quoting 1050 Tenants Corp. v Lapidus, 289 AD2d 145, 146.) Petitioner Vissicchio's contractually based grievance "accrue[d] anew every day, and for each injury \*\*\*." (1050 Tenants Corp. v Lapidus, supra, 146; see, Stalis v Sugar Creek Stores, Inc., supra; Ballin v Ballin, 204 AD2d 1078.) Insofar as Article 78 proceedings are concerned: "For purposes of determining when the statute of limitations [applicable to an Article 78 proceeding] begins to run, a distinction is made between the review of a final determination which has been rendered and review of a dispute in which there is a continuing failure or refusal of the body or officer to perform

a duty. Where there is a 'continuing failure' of an officer to act in the performance of his duty, such conduct prevents the running of the statute of limitations for an Article 78 proceeding." (6 NYJur 2d, Article 78 and Related Proceedings, § 158.) Thus, in Policemen's Benevolent Ass'n of Village of Spring Valley v Goldin (266 AD2d 294), an Article 78 proceeding brought by police officers to prohibit a municipality from making them work out-of-title in supervisory positions, the court held: "[W]here, as here, the practice complained of is a continuing one and is in violation of the New York State Constitution, the right to relief will not be barred by the four-month Statute of Limitations \*\*\*." In Janke v Community School Bd. of Community School Dist. No. 19 (186 AD2d 190, 193), the court held: "Where the claim is that a public official has failed to perform a continuing statutory duty, the right to relief will not be barred by the four-month Statute of Limitations \*\*\*." "The rule [pertaining to the running of the statute of limitations] been applied where the act or failure to act by the body or officer constitutes a continuing violation of a constitutional or statutory duty, \*\*\* or where the act or failure to act by the body or officer constitutes a continuing wrong." (6 NYJur 2d, Article 78 and Related Proceedings, § 158.)

The next issue presented is whether this court may consider affidavits from the petitioner and various other individuals in determining whether the administrative determination

under review has a rational basis. This court has concluded that it may not do so where the affidavits add to the administrative record. "In the course of judicial review, the court may not consider arguments or evidence not contained in the administrative record \*\*\*." (Brusco v New York State Div. of Housing and Community Renewal, 170 AD2d 184, 185; see, 72A Realty Associates v New York City Environmental Control Bd., 275 AD2d 284; Lusker v City of New York, 194 AD2d 487; 985 Fifth Ave. Inc. v State Div. of Housing & Community Renewal, 171 AD2d 572; Windsor Place Corp. v State Div. of Housing and Community Renewal, 161 AD2d 279; Plaza Realty Investors v New York City Conciliation and Appeals Bd., 110 AD2d 704.) "The function of the court upon an application for relief under CPLR Article 78 is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. Disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered \*\*\*." (Fanelli v New York City Conciliation and Appeals Bd., 90 AD2d 756, 757, affd 58 NY2d 952; see, Yarbough v Franco, 95 NY2d 342; Levine v New York State Liquor Authority, 23 NY2d 863; Dearborn Associates v Environmental Control Bd., 144 AD2d 556; Plaza Realty Investors v New York City Conciliation and Appeals Bd., supra.) Therefore, the court notes, the conflicting affidavits of the petitioner and other individuals which are dehors the administrative record may

not be used here to create new issues of fact and credibility requiring a hearing in this Article 78 proceeding. (See, CPLR 7804[h]; Archer v Town of Wheatfield, 300 AD2d 1108.)

An individual appointed by the Chief of Labor Relations conducted a "review meeting" on August 20, 2002. The decision of the Chief of Labor Relations states in relevant part, inter alia: "The alleged out-of-title duties that Grievant performs all fall within, or are reasonably related to, and not substantially different than, the duties in the Senior Court Clerk (JG-21) title standard. These duties include discussing daily court activities, assigning work responsibilities to court personnel and answering telephone and over-the-counter inquiries from attorneys \*\*\* and court personnel regarding court procedures and the filing of court documents." The Chief of Labor Relations additionally found, inter alia: (1) The Borough Chief Clerk's Office assigned Senior Court Clerks to the parts. (2) Since petitioner Vissicchio was more frequently assigned to the CCO pursuant to his request not to be rotated into a part, he was more frequently consulted about the availability of Senior Court Clerks for rotation into parts and more frequently requested to communicate assignments to other Senior Court Clerks. (3) Petitioner Vissicchio did not approve or deny annual leave requests, but merely relayed information to the Borough Chief Clerk's Office. (4) Petitioner Vissicchio did "not perform any general supervisory duties required of an Associate

Court Clerk \*\*\*." (5) The directory listed the names of many employees who "are simply more senior employees," and, "[f]or example, there are twelve other Senior Court Clerk listed as 'in charge' of parts or offices." (6) "The Associate Court Clerk title standard lists duties such as assigning work, planning and coordinating work schedules, and monitoring or reviewing work for compliance with instructions and procedures. Other general supervisory tasks of an Associate Court Clerk include signing time sheets, reviewing leave requests, conducting performance evaluations, resolving informal complaints and grievances, and preparing memoranda on court policies and procedures. Significantly, Grievant does not perform any of these duties."

As indicated above, the scope of judicial review in this Article 78 proceeding is narrowly limited to whether the determination of the Chief of Labor Relations has a rational basis in law and fact. (See, Bailey v Governor's Office of Employee Relations, supra; Gergis v Governor's Office of Employee Relations, supra; Tirone v Governor's Office of Employee Relations, supra; Security and Law Enforcement Employees, Dist. Council 82, AFSCME, AFL-CIO, on Behalf of Krom v Hartnett, supra.) Confining itself to the record made before the Chief of Labor Relations, as must be done here, (see, Fanelli v New York City Conciliation and Appeals Bd., supra), this court is constrained to find that the determination of the Chief of Labor Relations, reached in a five

page opinion, has a rational basis. (See, e.g., Haubert v Governor's Office of Employee Relations, 284 AD2d 879 [denial of out-of-title work grievance was rationally based where actual supervisory responsibility remained with another]; Bertoldi v Rosenblatt, 167 AD2d 237 [a determination of the Director of Employee Relations "that the assignment of Senior Court Clerks to IAS Parts did not involve assignments to 'duties substantially different' from those stated in the Senior Court Clerk Title Standard had a rational basis \*\*\*"]; Meadows v Rosenblatt, 161 AD2d 430 [senior office assistant in bookkeeping department of traffic court did not do out-of-title work as senior data entry supervisor or associate court clerk where, e.g., she did not evaluate the job performance of her co-workers, ensure the accuracy of their work, determine their vacation schedules or formulate policy for her department]). Among other things, petitioner Vissicchio did not show before the Chief of Labor Relations that he performed such duties of an Associate Court Clerk as signing time sheets, monitoring or reviewing work for compliance with instructions and procedures, and resolving informal complaints and grievances.

While the court is mindful that out-of-title work abuses may occur at a time of budget problems and hiring freezes, nevertheless, the petitioners chose to prosecute their claim through the administrative procedure provided for in the collective

bargaining agreement. The consequence of having done so is a limitation on the ability of the court to afford them relief. This court may not review the facts of an administrative proceeding de novo (see, Long Island-Airports Limousine Service Corp. v State Dept. of Transp., 170 AD2d 747; Velasquez v Perales, 151 AD2d 766; Marsh v Hanley, 50 AD2d 687), and the determination of the credibility of witnesses is the responsibility of the administrative agency where there is conflicting evidence and a choice of inferences is permissible. (See, Silberfarb v Board of Co-op. Educational Services, Third Supervisory Dist., Suffolk County, 60 NY2d 979; Lauria v County of Dutchess, 306 AD2d 532; Long Island-Airports Limousine Service Corp. v State Dept. of Transportation, supra.) This court, having a limited scope of review, may not simply substitute its own judgment for that of an administrative agency. (See, Sudarsky v New York State Div. of Housing and Community Renewal, 258 AD2d 405; Rudin Management Co., Inc. v New York State Div. of Housing and Community Renewal, 215 AD2d 243.)

Accordingly, the petition is dismissed.

Settle order.

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J.S.C.